criminal process by his physical presence therein. Of course, if he committed acts of sedition in several states he would thereby subject himself to the possibility of punishment by each such state.[28] But in this respect sedition is no different from other offenses, which, as the dissenting opinion below points out (R. 86), are punishable wherever and as often as they are committed.

III

IF IT SHOULD EVER APPEAR THAT THE STATE STATUTES, AS ADMINISTERED BY THE STATES, IN FACT STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF THE SMITH ACT, CONGRESS IS FREE TO ENACT LEGISLATION TO ELIMINATE SUCH CONFLICT.

Much has been written with respect to the wisdom of state sedition laws, and there has been speculation as to possible developments in the enforcement of such laws which could be inconsistent with the standards of personal freedom and

---

[28] The majority below also stated: "Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated" (R. 62). The provision of Pennsylvania law to which the majority refers, however, raises at most a question of procedural due process, with which this brief has no concern. It is irrelevant to the question of Pennsylvania's power in the light of the Smith Act to enact and enforce sedition legislation.

impartial justice which comprise our American traditions." But these suggestions, whatever merit they may have, do not bear on the issue of preemption presented by this case. This Court has unequivocally established that both the states, at least in the absence of congressional action to the contrary, and the federal government may constitutionally proscribe and punish advocacy of the violent overthrow of established government. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Dennis* v. *United States*, 341 U. S. 494. And this Court has cautioned that it "will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the * * * States * * *." *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 749.

We have spelled out in this brief our reasons for concluding that Congress has not sought to displace state legislation proscribing advocacy of the violent overthrow of government. Doubts

---

[11] *E. g.*, Gellhorn, *The States and Subversion* (1952); Chafee, *Free Speech in the United States* (1941); Prendergast, *State Legislatures and Communism: The Current Scene*, 44 Am. Pol. Sci. Rev. 556 (1950); Note, *Effectiveness of State Anti-Subversive Legislation*, 28 Ind. L. J. 492 (1953); Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 Mich. L. Rev. 407 (1955); cf. O'Brian, *Civil Liberty in War Time*, Report of New York State Bar Ass'n, Vol. 42, reprinted as S. Doc. 434, 65th Cong., 3d sess., pp. 12-15.

as to the wisdom of such legislation or the possibility that it might be abused in practice should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states, must yield to the paramount federal power.[30] We have found no indication, express or by implication, that Congress has at any time considered it in the public interest to displace state sedition laws. Of course, should it at any time appear to Congress to be in the public interest to limit the

[30] There is no occasion here to examine the permissible scope of congressional action. In view of the vigor of petitioner's argument as to the inviolable nature of its right of self-preservation (Br. 24-33) and the necessity for state sedition statutes (Br. 28), however, it might be appropriate to state our view that since the Constitution endows Congress with the power to suppress seditious advocacy threatening the forcible overthrow of the United States Government (*Dennis* v. *United States*, 341 U. S. 494), this power necessarily includes the authority to take all steps required to make federal action in the premises effective and to protect it against unreasonable interference from any source. Cf. *Lichter* v. *United States*, 334 U. S. 742; *Hines* v. *Davidowitz*, 312 U. S. 52; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. In view of the international nature of the Communist conspiracy and the fact that its activities in the United States are national in scope, it would be a proper exercise of federal power, if Congress found such action to be required in the public interest, to prohibit state enforcement activities under state sedition laws deemed by Congress to interfere with or obstruct the accomplishment of the full objectives of the federal enforcement program.

operation of such state laws, Congress is free to legislate to that end. The problem, if there be one, is a legislative problem to be dealt with by Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed.

SIMON E. SOBELOFF,
Solicitor General.
WILLIAM F. TOMPKINS,
Assistant Attorney General.
CHARLES F. BARBER,
Assistant to the Solicitor General.
HAROLD D. KOFFSKY,
PHILIP R. MONAHAN,
ALICE E. MILLER,
Attorneys.

OCTOBER 1955.

APPENDIX

The Smith Act (Act of June 28, 1940, c. 439, 54 Stat. 670, 671, 18 U. S. C. 2385),[1] provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly

[1] 18 U. S. C. 2385 is a consolidation without substantive change of Sections 2, 3, and 5 of the so-called Smith Act. The Act's official name, based on the provisions of Title III, is the "Alien Registration Act, 1940" (§ 41, 54 Stat. 676). However, particularly when its Title I (§§ 1–5) is referred to—this being the Title which contains the provisions proscribing advocacy of the violent overthrow of the Government, etc.—it has come to be designated popularly as the "Smith Act," after its author and sponsor, Representative Howard W. Smith of Virginia.

of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

Section 207 of the the Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. 4207,[2] provides:

The word "sedition," as used in this section, shall mean:

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

---

[2] The section is derived without material change from the Pennsylvania Act of June 26, 1919, P. L. 639, §§ 1, 2, as amended by the Act of May 10, 1921, P. L. 435, § 1. See "Historical Note" following 18 Purd. Pa. Stat. Ann. 4207.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

The word "sedition" shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both.

U. S. GOVERNMENT PRINTING OFFICE 1956

HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

STEVE NELSON.

MOTION OF AMICI CURIAE FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT, PURSUANT TO RULE 44(7) OF THE RULES OF THIS COURT

FRANK J. DONNER,
342 Madison Avenue,
New York 17, N. Y.,

Attorney for Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

STEVE NELSON.

MOTION OF AMICI CURIAE FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT, PURSUANT TO RULE 44(7) OF THE RULES OF THIS COURT

The undersigned counsel for *amici curiae* in the above entitled proceeding respectfully moves this Court pursuant to Rule 44(7) for leave to participate in the oral argument.

In accordance with the provisions of Rule 42 of this Court, counsel for the undersigned individuals has obtained the written consent of all of the parties to this case to the filing of a brief *amici curiae* in support of the position of

the Respondent herein. This brief is in the process of preparation and will be timely filed under the applicable rules on or before November 4, 1955.

The individual *amici curiae* have all either been indicted or subject to interrogation pursuant to sedition laws in their respective states, including the states of Massachusetts, New Hampshire, Florida and Kentucky. With the exception of one individual, further proceedings involving the *amici curiae* have been postponed either by stipulation, by action of court, or by the announcement of state attorneys, pending the decision of this Court in the case at bar. Consequently, the action of this Court in the present case intimately affects each of the *amici curiae*.

This case touches fundamental questions of public policy involved in the application and enforcement of state sedition laws. This Court has already granted permission to the Attorney General of New Hampshire as well as the Solicitor General of the United States to argue orally as *amici curiae*. The Attorney General of New Hampshire appears on behalf of himself and numerous other state attorneys general. Since the action of this Court will profoundly affect the enforcement and application of state sedition laws throughout the country, the participation of the *amici curiae* in the oral argument will be, we respectfully suggest, of considerable assistance to the Court in bringing before the Court legal and practical considerations involved in the enforcement of these laws and their impact upon the federal system of law enforcement.

Accordingly, the undersigned respectfully moves that this Court grant permission for the participation in oral argument of the undersigned, a member of the bar of this Court, as counsel for the individual *amici curiae*. It is

respectfully suggested that one half hour be allocated for this argument.

FRANK J. DONNER,
342 Madison Avenue,
New York 17, N. Y.
Attorney for Amici Curiae

PHIL FELDMAN
MAX SHLAFROCK
CHARLES MARKS
DAVID LIPPERT
CHARLES SMOLIKOFF
WALTER MARKS
AUGUSTA BIRNBERG
EMANUEL GRAFF
MAURICE CARROLL
ABRAHAM SORKIN
H. D. PRENSKY
MICHAEL SHAMTZEK
MORRIS ROHINSKY
JOSE CARBONELL
CARL BRADEN
ANNE BRADEN
VERNON BOWN
LOUISE GILBERT
LARUE SPIKER
I. O. FORD
LEWIS LUBKA
OTIS A. HOOD
ANNE B. TIMPSON
EDITH ARBER
FRANKLIN P. COLLIER
DR. DIRK J. STRUIK
DR. WILLARD UPHAUS

IN THE

Supreme Court of the United States

October Term, 1955.

No. 10.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON.

On Writ of Certiorari to the Supreme Court of Pennsylvania, Western District.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

OSMOND K. FRAENKEL,
General Counsel,
HERBERT MONTE LEVY,
Staff Counsel,
AMERICAN CIVIL LIBERTIES UNION,
170 Fifth Avenue,
New York 10, N. Y.,
Amicus Curiae.

Of Counsel:
JULIAN E. GOLDBERG,
Counsel,
AMERICAN CIVIL LIBERTIES UNION,
Greater Philadelphia Branch,
260 So. 15th Street,
Philadelphia 2, Pa.

TABLE OF CASES CITED.

	Page
Commonwealth v. Truitt, 369 Pa. 72 (1951)	12
Hines v. Davidowitz, 312 U. S. 52	3
Matson v. Jackson, 368 Pa. 283 (1951)	11
Milasinovich v. Serbian Progressive Club, Inc., 369 Pa. 26 (1951)	8
Roth v. Mussmano, 364 Pa. 359 (1951)	12
Schlesinger Petition, 367 Pa. 476 (1951)	12
Sherman v. Yiddisher Kultur Farband, 375 Pa. 108 (1953)	10
Truscott v. Yiddisher Kultur Farband, No. 79, March T. 1955	10

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Byse, A Report on the Pennsylvania Loyalty Act, 101 U. of Pa. L. Rev. 480 (1953)	7
Gellhorn, The States and Subversion, 363-369 (1952)	7
Note, Effectiveness of State Anti-Subversive Legislation, 28 Ind. L. J. 492 (1953)	8
Pennsylvania Loyalty Act of 1951, 65 Pa. Stat. Ann. 211	7
Pennsylvania Penal Code of 1939, Section 207, 18 Pa. Stat. Ann. 4207	4
Prendergast, State Legislatures and Communism: The Current Scene, 44 Am. Pol. Sci. Rev. 550 (1950)	7

IN THE

Supreme Court of the United States

October Term, 1955.

No. 10.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

QUESTION PRESENTED.

Whether the national interest makes it necessary to recognize federal preemption of the field of anti-sedition legislation.

INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION.

The American Civil Liberties Union was founded in 1920. It is a non-profit organization devoted exclusively to the cause of civil liberties; has no interest in any political party or political dogma; and stands unalterably opposed to all forms of dictatorship including Communism and

Fascism. It is the continuing responsibility and policy of the Union vigorously to defend the civil liberties of any person, however unpopular that person or his views may be, and regardless of any political party, organization, denomination, race or nationality to which that person may belong.

In considering the rights of members of the Communist Party, the Union recognizes that problems have arisen because of the dual nature of the Communist movement. It is both a political agitational movement and a part of the Soviet conspiracy. Insofar as it is the first, its members have all the rights of members of other parties; to the extent that it is the second, its members may in some particulars be restricted by law. The Union has recognized this distinction in positions it has taken in the past with respect to various laws and governmental actions affecting totalitarian movements—Fascist, Ku Klux Klan as well as Communist—and will continue to do so in the future.

The Union's sole interest in the case at bar is in the civil liberties aspects of the case. The fact that the respondent, Steve Nelson, is an avowed Communist and is accused of spreading a doctrine generally despised in the American community points up our concern and responsibility. Our participation is not grounded upon sympathy with or endorsement of Nelson's views, but rather it springs from a conviction that constitutional liberties are tested in just the kind of atmosphere that surrounds the present case. We are mindful that the expression of popular views is not likely to be denied by state action, and that the more unpopular the expression the more crucial and meaningful its constitutional protection.

ARGUMENT.

The Enforcement of State Sedition Laws Threatens Basic Constitutional Liberties, Particularly Those Protected by the First Amendment.

The view of the Pennsylvania Supreme Court in the instant case is that

> ". . . the congressional purpose to preempt a particular field is not made to depend upon a positively expressed legislative intent to that end. Such purpose can as readily be evidenced objectively by what the circumstances reasonably indicate as being necessary for the complete and unhampered effectuation of the federal aims and objectives." 377 Pa. at 66.

This is the same principle enunciated by this Court in *Hines v. Davidowitz*, 312 U. S. 52, 81, where it was said:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. *Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.* And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand

broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. *And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.*" (Emphasis supplied.)

The danger to civil liberties which is inherent in the recognition of the power of the states to punish sedition is evidenced by the following language of the court below:

> "As the defendant has, at all times, admitted his membership and position in the Communist Party, obviously his views are so extremely unpopular with a vastly preponderant majority of the citizenry of our Country as to amount virtually to an anathema in the public mind. That very circumstance makes it especially incumbent upon a court, in reviewing the conviction of such a person for an alleged offense against the body politic, to scrutinize the record with utmost care to see that he received a trial that fully comports with our concept of traditional due process—quite apart from any question of trial error in the admission or rejection of evidence or in alleged excesses or deficiencies in the court's instructions to the jury." 377 Pa. at 62.

When this statement is viewed in the light of the provisions of the Pennsylvania Sedition Act here under consideration,[1] and the fact that a reversal of the decision of

---

1. Section 207 of the Pennsylvania Penal Code of 1939, 18 Pa. Stat. Ann. 4207, defines sedition as any one of some eight types of activity. Six of the eight types of conduct prohibited do not embrace actual overt acts. The Section provides for a maximum sentence, upon conviction, of twenty years' imprisonment or $10,000.00 fine, or both.

the court below would permit the individual district attorneys of the sixty-seven counties of Pennsylvania to institute individual prosecutions throughout the state against all those who might be inclined to assert a controversial or unpopular political doctrine—so broad is the thrust of the Pennsylvania Act—the gravity of the harm threatened assumes its proper proportion.[2] The current Attorney General's list of subversive organizations lists almost three hundred organizations as such. If the states are to be permitted to prosecute seditious activity, each of Pennsylvania's sixty-seven district attorneys will be free to adopt the list, and augment it, and to equate membership in any of the organizations therein, for purposes of prosecution, with sedition as defined in the Pennsylvania Act.

The extent to which even the most judicious state officer, influenced by the highest patriotic motives, can react to the impact of international tension and domestic fear is illustrated by the vigor of the dissenting opinion of the court below, as follows:

> ". . . if there could be any doubt on the question—and in my opinion there is none—it should certainly not be resolved in favor of freeing one of the top leaders of the Communist Party in America, who has just been convicted of plotting the destruction of our Country." 377 Pa. at 77.

At another point, the dissenting Justice said:

> "If the majority opinion prevails, isn't it clear as crystal that all these State laws will be superseded and suspended or invalidated by the Smith Act; and if so, what will it cost the States in the way of damages and other remedial actions? And if the majority opinion

---

2 The office of county district attorney is an elected office. The county district attorney is not a subordinate of the State Attorney General, and can institute prosecutions and policies which are divergent to those of the State Department of Justice.

prevails, what will happen to all the traitors and dangerous criminals who have been convicted under state acts and whose sentences have not been finally determined, as well as those who are now in state jails serving sentences for violating state treason or sedition or similar laws? *And most important of all, what will happen to the security of our Country when the patriotic efforts of all state legislatures, district attorneys and Courts and of all patriotic citizens anxious to catch and punish traitors, are rejected, and the existence of our State and Nation is left exclusively to the slow processes of our sometimes apathetic or inept Federal Government?*" 377 Pa. at 85. (Emphasis supplied.)

And again:

"Congress further knew that our Country needed, in order to combat the widespread and occult perils of communism, the help not only of the FBI and of all Federal district attorneys and all officials in every Federal department and agency of Government, but it also needed the active assistance and cooperation of all States, and all State Courts, and all State officers and agencies, as well as the enthusiastic help of every patriotic American citizen. *Congress also knew that juries are sometimes fooled or duped by false testimony or by clever lawyers and thus acquit those who are guilty of grave crimes; and it would certainly be wise to have State officers, State Courts and State Juries give to our Country additional help and protection against those who are attempting to destroy our Government.*" 377 Pa. at 87. (Emphasis supplied.) [3]

3. At least part of the rationale of the dissent is that Congress could not have intended to "give to a Federal Government *which had demonstrated its utter inability* to solve or effectively deal with the problem and menace of Communism, the sole and exclusive right and power to defend our State and Country from the traitors within our ranks." 377 Pa. at 89.

The Brief filed by the United States as Amicus curiae recognizes our concern, but assuages it with the statement that it "should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states must yield to the paramount federal powers" (U. S. Br. 8). But the fact is that there is a history of injudicious official action against subversive elements on the state and local level, and of irresponsible private prosecution, which create a community atmosphere dangerous to those standards of individual liberty heretofore considered consistent with federal constitutional guarantees.

It should be stated at this point that the lack of legislative findings of a need for anti-subversive control at a local level is indicative of an absence of necessity for sectional regulation in this area. See Prendergast, *State Legislatures and Communism: The Current Scene*, 44 Am. Pol. Sci. Rev. 556, 574 (1950). By resort to the all too common challenge: "Are you for or against Communism", statutes which offend against political freedom can be passed by near unanimous votes. See Gelhorn, *The States and Subversion*, 363-369 (1952). In fact, conscientious state legislators have acknowledged that they have voted for such measures merely to avoid political embarrassment and personal ostracism. See *e.g.*, the statement of Pennsylvania Senator Dent, made in reference to the Pennsylvania Loyalty Act of 1951, 65 Pa. Stat. Ann. 211, that "I will vote for this measure because the injustices of the day demand me to vote for it." Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. of Pa. L. Rev. 480, 507 (1953). In addition, when such a statute fails to result in the arrest and conviction of large numbers of "subversives", the usual legislative assumption is not that the act was not needed initially, but rather that additional legislation is called for in order to apprehend those who have managed

to evade the original enactment. Note, *Effectiveness of State Anti-Subversive Legislation*, 28 Ind. L. J. 492 (1953).

The Government states in its Brief that "so far as we know there have in recent years been prosecutions (for seditious activity) only in Pennsylvania and Massachusetts"; and that "This may well reflect regard by the states for federal activity in the field" (U. S. Br. 30n). While both of these statements may be substantially correct,[4] and while it is also true that the number of prosecutions under the Pennsylvania Sedition Act has been extremely small (Digest of the Public Record of Communism in the United States (1955), 284), there have been other forms of attack upon Communists and suspected Communists in Pennsylvania which indicate an unwillingness on the part of local officials as well as certain private citizens to leave control of the problem of subversive activities to the federal government. We believe that an analysis of these cases, all but one of which, like the instant case, arose in Allegheny County, will illustrate the threat to civil liberties which is posed by the recognition of continued state action in this area.

1. In *Milasinovich v. Serbian Progressive Club, Inc.*, 369 Pa. 26 (1951) a shareholders' bill in equity was filed by five members of a nonprofit corporation, alleging that the officers of the corporation were perverting the purpose of the corporate charter by bringing the corporation under the control of the Communist Party and were diverting its assets toward subversive uses. The Chancellor, after a hearing "but with a record which leaves much to be desired," (369 Pa. at 28) entered a final decree expelling 23 shareholders for being Communists or Communist sympathizers; ordering reinstatement of certain anti-Communist members; and permanently enjoining use of the club premises "for Communist meetings, discussion, conferences, or for the sale or distribution of anti-American or any other

4. We are aware of the case of *Commonwealth v. Braden*, now pending in the Court of Appeals of Kentucky.

treasonous literature of any character." The Supreme Court of Pennsylvania set aside the decree because only 7 of the 23 expelled members had been parties to the proceeding. In addition, the Court found that part of the decree admitting "former members who were anti-Communists" to be "too vague and indefinite for legal enforcement" 369 Pa. at 32. In remitting the record to the Allegheny County Court, the Supreme Court specifically directed the trial court to determine, after proper joinder, which members of the association were Communists and which were not; to expel those found to be so; and to order and supervise an election of directors. Notwithstanding specific directions to this effect by the Supreme Court, when the case went upon appeal a second time, it was found that: "No hearings have been held either by the Court or the Master, no findings of fact or conclusions of law have been made, no election has been held, or supervised, as ordered" 377 Pa. 385, 388 (1954).

2. In a similar case, nine years after a non-profit corporate charter was issued to the Yiddisher Kultur Farband by the Common Pleas Court of Allegheny County, a petition was filed by one Harry Allan Sherman, Esq., on behalf of two non-members of the organization, as of the same court, term and number as the original incorporation proceeding, seeking to intervene therein and obtain the revocation of the corporate charter and the liquidation of the corporate assets on the ground that a fraud had been perpetrated on the court because the corporation was in substance a Communist front and was perverting its avowed corporate purpose. On preliminary objections, the lower court upheld the jurisdictional assertion by the interveners. On appeal, the Supreme Court reversed, noting:

> "The present petitioners are merely informers, without any particular interest of their own and if they were to be permitted to institute quo warranto proceedings, the same right would exist on the part of each and every citizen of the Commonwealth however irre-

> sponsible, however improperly motivated, he might be. If the Association is what petitioners allege it to be, the situation is one of public concern and a public wrong, and not a private injury, and as such, it is for the Commonwealth and for it alone acting through the Attorney General to apply for the issuance of a writ of quo warranto."
>
> *Sherman v. Yiddisher Kultur Farband*, 375 Pa. 108, 113 (1953).

Subsequently a quo warranto proceeding was instituted in the name of the Attorney General of Pennsylvania, seeking *only* the revocation of the corporate charter. This case came on for trial before the same lower court judge as before. The Attorney General had retained the same Harry Allan Sherman, Esq., as a special assistant to the Deputy Attorney General in charge of the prosecution. During the course of the proceeding a consent decree satisfactory to the Attorney General and the defendant's attorney was agreed upon. However, Mr. Sherman, the special Deputy Attorney General "in defiance of the directions of his superior, the Attorney General, objected to the consent decree." *Truscott v. Yiddisher Kultur Farband*, No. 79, March T. 1955 (p. 4 Opin.). This position was concurred in by the trial judge, who refused to enter the agreed upon consent decree and ordered the president of the corporation either to unconditionally surrender the corporate charter or proceed to trial. Later, when counsel for the corporation asked leave to withdraw from the case, the judge ordered the defendant to obtain new counsel within 24 hours. The corporate president reluctantly agreed to the surrender of the charter, asserting that he was "physically unable to secure counsel and thereby continue with the defense of the case" (p. 6). The court then appointed a liquidating trustee, and named Mr. Sherman as co-counsel for the trustee. Upon learning these facts, the Attorney General dismissed Mr. Sherman from the case. The Su-

preme Court noted in its opinion that the trial judge "in the long run permitted him (Mr. Sherman) to indulge in violent diatribes accusing members of the defendant association of subversive activities, which unquestionably would have required the grant of a new trial if the case had gone to the jury and resulted in a verdict against the defendant" (p. 12). On appeal the Supreme Court vacated the order of the lower court appointing a liquidating trustee for the corporation. Mr. Sherman filed a brief as amicus curiae, which the court "suppressed as containing scandalous, impertinent and defamatory matter, libelling the Attorney General of the Commonwealth." Order of June 27, 1955.

3. In *Matson v. Jackson*, 368 Pa. 283 (1951) the Attorney General of Pennsylvania appointed one of his deputies to conduct a hearing on his charges of "alleged Communistic leanings, sympathies, and utterances" of an Assistant District Attorney of Allegheny County, one Marjorie Matson. Another Deputy Attorney General was appointed to present testimony to the hearing Deputy. Mrs. Matson, the Assistant District Attorney, obtained an injunction against the proceeding. In affirming the injunction order, the Supreme Court noted that to permit such a hearing by the Attorney General:

> "... would be equivalent to holding that the Attorney General was vested with power to conduct hearings as to the political, economic and social views of every public officer in the Commonwealth entrusted with the execution of the laws from the Governor himself down to the least important officials, including even those duly elected, in order to ascertain whether, in his opinion, they were fit and competent to perform their respective duties in enforcing the laws—a proposition the very statement of which illustrates its inherent absurdity." 368 Pa. at 288.[5]

5. Mrs. Matson was subsequently cleared of similar charges by the Allegheny County Bar Association.

TABLE OF CONTENTS OF BRIEF.

	Page
QUESTION PRESENTED	1
INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION	1
ARGUMENT	3
The Enforcement of State Sedition Laws Threatens Basic Constitutional Liberties, Particularly Those Protected by the First Amendment	3
CONCLUSION	13

4. In *Schlesinger Petition*, 367 Pa. 476 (1951), a Judge of the Allegheny County Court, prior to hearing a negligence case, emptied the courtroom and proceeded to interrogate the attorney for the plaintiff as to his Communist affiliations. When the attorney declined to answer, and started to leave the courtroom, the judge had him physically restrained by court officers. This was followed by a citation for contempt, which the attorney attacked by a petition for writ of prohibition. The Supreme Court granted the writ, vacated the trial judge's contempt order and further restrained him from "enforcing or in any manner whatsoever carrying into effect his determination that petitioner is unfit to practice law or to try cases. . . ." 367 Pa. 476, 483 (1951).

5. In *Roth v. Massmano*, 364 Pa. 359 (1951), a Common Pleas judge conducted an *ex parte* inquiry, in chambers, of a prospective grand juror and concluded, merely on "the sworn word of an informant" (364 Pa. at 360), that the juror was a Communist and therefore unfit to serve. On petition for writ of mandamus against the judge, the Supreme Court stated (360):

> "The procedure pursued by the judge cannot be supported. It constituted an arrogation and exercise of a power beyond the jurisdiction of any judge under the existing law."

6. See also *Commonwealth v. Truitt*, 369 Pa. 72 (1951), in which a conviction for assault and battery was reversed because of improperly admitted evidence as to the Communist affiliations of two defendants.

The above cases illustrate the harm that ensues from disorganized attempts to deal with the problem of subversion on a local level. While it is true that the type of prosecution illustrated by the above cases will not necessarily be precluded in the future by a decision of this Court to the effect that the states can no longer punish the crime of

sedition *per se* because of federal preemption of the field, it is reasonable to assume that such proceedings will be less likely to occur if there is a recognition by the courts that the control of subversive activities is a matter best left to the federal government.

Moreover, it cannot be overlooked that federal enforcement agencies are better equipped to cope with the problem than their local counterparts. This factor, and the lesser likelihood that federal officials will react unfavorably to local attitudes and prejudices, lead to the conclusion that personal freedoms will be in safer hands if the federal government is held to have the exclusive power to prevent sedition.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

OSMOND K. FRAENKEL,
General Counsel,
HERBERT MONTE LEVY,
Staff Counsel,
AMERICAN CIVIL LIBERTIES UNION,
170 Fifth Avenue,
New York 10, N. Y.,
Amicus Curiae.

Of Counsel:

JULIAN E. GOLDBERG,
Counsel,
AMERICAN CIVIL LIBERTIES UNION,
Greater Philadelphia Branch.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON.

BRIEF OF INDIVIDUAL AMICI CURIAE

FRANK J. DONNER,
342 Madison Avenue,
New York, N. Y.,
Attorney for Individual Amici Curiae

Of Counsel:

OLIVER S. ALLEN
6 Beacon Street
Boston, Mass.

LAWRENCE D. SHUBOW
10 Tremont Street
Boston, Mass.

ROBERT R. CLARK
31 Milk Street
Boston, Mass.

B. LORING YOUNG
10 Tremont Street
Boston, Mass.

GABRIEL KANEROVITZ
294 Washington Street
Boston, Mass.

ROSAL W. FRANCE
104 East 40 Street
New York, N. Y.

FRANK J. DONNER
ARTHUR KINOY
MARSHALL PERLIN
342 Madison Avenue
New York, N. Y.

INDEX

PAGE

Preliminary Statement 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of Facts 2

A. Kentucky 2

B. Massachusetts 10

C. Florida 19

D. New Hampshire 27

Argument 35

Introduction 35

I—Federal statutes covering sedition are so pervasive as to preclude state legislation by occupying the field 37

II—The provisions and purposes of the state statutes conflict with federal statutes on the same subject 41

A. Contradictory provisions make the two sets of statutes irreconcilable 41

B. Conflicting purposes of the statutes make coexistence of the statutes impossible 42

C. Disparate penalties under state statutes conflict with the congressional scheme of deterrents 45

PAGE

III. The paramount interest of the United States in the area of sedition control precludes state legislation 48

A. The federal government, by constitutional mandate, has a paramount interest in the internal security of the United States and all political subdivisions 49

B. The federal government has a dominant interest in striking a balance between curbing sedition and protecting fundamental rights and freedoms 51

IV. The regulation of sedition has direct impact upon foreign relations which are exclusively in federal sphere of authority 54

CONCLUSION 57

CASES CITED

American Communications Association v. Douds, 339 U. S. 382 54

Bethlehem Steel Co. v. New York Labor Board, 330 U. S. 767 40

Blau v. United States, 340 U. S. 159 23

Brunner v. United States, 190 F. 2d 167, rev'd 343 U. S. 918 23

Cabot v. Corcoran, 123 N. E. 2d 221 (Mass. Sup. Jud. Ct.) 33

California v. Zook, 336 U. S. 725 47

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U. S. 597 39

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 40
Commonwealth v. Carl Braden, Jefferson Circuit Court, State of Kentucky, No. 101692 2
Commonwealth v. Hood, Suffolk Sup. Ct., Nos. 1923 and 1924 (Mass.) 15
Commonwealth v. Hood, et al., Suffolk No. 2457 (1954) (Mass.) 13
Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133 ..... 34, 39, 46, 49, 50, 53
Commonwealth v. Struik, Middlesex Sup. Ct., Crim. No. 40725 (Mass.) 11
Commonwealth v. Struik, et al., Middlesex Sup. Ct., Crim. Nos. 40726, 40727 (Mass.) 12
Communist Party v. Subversive Activities Control Board, No. 48, October Term, 1955 40
DeJonge v. Oregon, 299 U. S. 353 52
Dennis v. United States, 341 U. S. 494 ..... 12, 54, 56
Garner v. Teamsters, Chauffeurs and Helpers Local Union, 346 U. S. 485 44
Gregory v. Commonwealth, 226 Ky. 617, 11 S. W. 2d 432 (1928) 5
Hebert v. Louisiana, 272 U. S. 312 51
Hill v. State of Florida ex rel. Watson, 325 U. S. 538 ..... 40, 45
Hines v. Davidowitz, 312 U. S. 52 ..... 36, 42, 52
Houston v. Moore, 5 Wheat. 1 46
International Union, etc. v. O'Brien, 339 U. S. 454 40
Kaplan, et al. v. Bowker, et al., Massachusetts Supreme Judicial Court, No. 11,572 18

Kelly v. Washington, 302 U. S. 1

Loveless v. Commonwealth, 241 Ky. 52, 43 S. W. 2d 348 (1931)

Luscomb v. Bowker, et al., Suffolk Sup. Ct., No. 70,017 in Equity (Mass.)

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605

Nelson v. Wyman, 98 N. H. 33, 105 A. 2d 756 (1954)

Pennsylvania R. Co. v. Public Service Commission, 250 U. S. 566

Rice v. Santa Fe Elevator Corp., 331 U. S. 218

Schenck v. United States, 249 U. S. 47

Sinnot v. Davenport, 22 How. 227

State ex rel. Feldman, et al. v. Kelly, 76 So. 2d 798 22, 23,

Tormey v. Bowker, et al., Suffolk Sup Ct., No. 69,984 in Equity (Mass.)

United States v. Dennis, 183 F. 2d 201 (C.A. 2)

United States v. Lanza, 260 U. S. 377

United States v. Pink, 315 U. S. 203

CONSTITUTION AND STATUTES CITED

U. S. Constitution, Article IV, Sec. 4

First Amendment 34, 38,

18 U. S. C. Sec. 371 (1952 ed.)

Communist Control Act of 1954, 68 Stat. 775 ff. 38, 39, 42,

Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff. (1952 ed.) 38, 39, 41, 42, 43, 49, 55,

Smith Act, 54 Stat. 670, 18 U.S.C. 2384, 2385 (1952 ed.) 38, 45, 49, 55

Fla. Stat. Ann., Title 44, Sec. 876.01-876.03, 876.22-876.30 19, 20, 21, 22, 27, 41, 44, 45, 50

Ky. Rev. Stats. 1953, Sec. 432.020-432.040 4, 45, 50

Mass. Acts and Resolves of 1951, C. 805, Mass. Ann. Laws, C. 264, secs. 16ff. (Supp., 1954) 40, 41, 43, 44, 41, 44, 50

Mass. Ann. Laws, C. 264, Sec. 41 (1954 Supp.) 10, 14

Mass. Acts and Resolves of 1953, Chapter 89 17

Mass. Acts and Resolves of 1954, Chapter 123 18

Mass. Acts and Resolves of 1955, Chapter 52 17

New Hampshire Subversive Activities Act of 1951, N. H. Rev. Laws, C. 457-A 27, 44, 50

New Hampshire General Court, Joint Resolution, Laws of 1953, C. 307 27

MISCELLANEOUS

Annual Report of the Director of the Administrative Office of the United States Courts 40

Chafee, *Free Inquiring Mind* (1928) 10

[illegible] 55

81st Cong., 2d Sess., H.R. Rep. No. 2980 32

81st Cong., 2d Sess., S. Rep. No. 1358 55

82nd Cong., 1st Sess., Committee on Un-American Activities, Hearings, *Exposé of Communist Activities in the State of Massachusetts (Based on the Testimony of Herbert A. Philbrick)* 42

84th Cong., 1st Sess., H. R. Report No. [illegible] (June 27, 1955) [illegible]

Emerson and Haber, *Political and Civil Rights in the United States* (1952) 38, 4[illegible]

Gellhorn, *The States and Subversion* (1952) 27, 46, 5[illegible]

Mass. House Documents, No. 2223 (1951) 1[illegible]

Massachusetts House Order No. 2788 (1950) 1[illegible]

Mass. Senate Documents, No. 760 (1955) 1[illegible]

McCarran, *The Internal Security Act of 1950*, 12 U. of Pitt. L. Rev. 481 (1951) 4[illegible]

O'Brian, *National Security and Individual Freedom* (1955) 3[illegible]

Report of the Attorney General to the New Hampshire General Court. (Wyman Report), January 5, 1955 28, 29, 30, 31, 32, 33

Sutherland, *Freedom and Internal Security*, 64 Harv. L. Rev. 383 (1951) 3[illegible]

2 U. S. Code Cong. Serv. 1950, 3888 4[illegible]

64 Yale Law J. 712 (1955) 5[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

STEVE NELSON.

BRIEF OF INDIVIDUAL AMICI CURIAE

Preliminary Statement

This brief *amici curiae* is submitted in accordance with the provisions of Rule 42 of this Court. The written consent of all the parties to this case has been obtained to the filing of a brief *amici curiae* in support of the position of the respondent herein.

The individual *amici curiae* have all either been indicted or subjected to interrogation pursuant to sedition laws in several state jurisdictions, including Massachusetts, New Hampshire, Kentucky, and Florida. With the exception of one individual, further proceedings involving the *amici curiae* have been postponed or held over either by stipulation, by action of court, or by the announcement of state attorneys, pending the decision of this Court in the case at bar. Consequently, the action of this Court in the present case intimately affects each of the *amici curiae*.

Opinions Below

The opinion of the Superior Court of Pennsylvania is reported at 172 Pa. Super. 125, 92 A. 2d 431. The majority and dissenting opinions in the Supreme Court of Pennsylvania are reported at 377 Pa. 58, 104 A. 2d 133.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. A petition for reargument was denied on April 27, 1954. See 377 Pa. 58, 60. The petition for a writ of certiorari was filed on July 24, 1954, and was granted on October 14, 1954. The jurisdiction of this Court rests upon 28 U. S. C. 1257(3).

Questions Presented

1. Does a state have the power to enact a sedition law making criminal the advocacy of, or participation in a conspiracy to advocate, overthrowing the government of the state or the United States by force and violence?

2. Did the Smith Act, as amended (June 28, 1940, c. 439, 54 Stat. 670-1, 18 U. S. C. 2385), making sedition a federal crime, supersede the Pennsylvania Sedition Act (June 26, 1919, 18 Purd. Pa. Stat. Ann. 4207)?

Statement of Facts

A. Kentucky

On December 13, 1954, Carl Braden, a copy reader employed by the *Louisville Courier-Journal*, was found guilty of sedition by a jury in the Jefferson Circuit Court, State of Kentucky, and sentenced to fifteen years' confinement at hard labor, and fined $5,000. *Commonwealth v. Carl*

Braden, No. 701692. An appeal to the Court of Appeals of Kentucky was granted and bail fixed in the amount of $40,000. Efforts to obtain a reduction in bail were unsuccessful, and the defendant was imprisoned for seven months until bond could be posted on July 12, 1955.

The case arises out of several indictments returned by the Jefferson County Grand Jury in connection with its investigation of the dynamiting of the home of Andrew Wade IV, a young Negro electrical contractor and Navy veteran, on June 27, 1954. At Wade's suggestion, Braden and his wife Anne had purchased this house on May 10, 1954, in an all-white neighborhood, transferring title to Wade on May 13, 1954.

Immediately upon Wade's taking possession of the home on May 15th, a series of violent incidents occurred. Shots were fired into the house, rocks were hurled through its picture window, and a cross was burned in an adjoining vacant lot. Inflammatory articles appeared in a neighborhood weekly paper, the *Shively Newsweek*. These acts were plainly designed to force the Negro family out of the neighborhood. The attacks came to a climax shortly after midnight on June 27th, when a bomb exploded under the Wade house.

The subsequent county police investigation appeared to be inconclusive. Commonwealth Attorney A. Scott Hamilton announced that the entire matter would be placed before a grand jury the following September. He suggested that there were two possible "theories" of the crime. One was that the house had been dynamited by hostile neighbors. The other was that the explosion was the work of Wade himself or his friends and supporters, in an effort to make trouble between the races.

The grand jury began its investigation on September 13, 1954. The Commonwealth Attorney directed his investigation toward the political beliefs and associations of Wade, Mr. and Mrs. Braden, and their friends, in an increasingly

transparent attempt to implicate them in some sort of Communist conspiracy to stir up racial discord in Louisville. Several witnesses refused to answer questions about their alleged Communist ties—initially on the ground that such questions were irrelevant to the inquiry, and later on the plea of the privilege against self-incrimination. These constitutionally privileged refusals to answer questions about alleged Communist beliefs and affiliations were seized upon to buttress the "red plot" theory.

On October 1, 1954, the grand jury indicted Carl Braden; his wife Anne, a member of the board of the local chapter of the National Association for Advancement of Colored People; Larue Spiker, a social worker who had been employed in a Louisville mill and was active in labor circles; Louise Gilbert, social worker and former chairman of the Louisville branch of the Women's International League for Peace and Freedom; Vernon Bown, a truck driver who had helped protect the Wade family; and I. O. Ford, a 79-year-old retired riverboat captain. This indictment did little more than repeat the language of the sedition statute, Ky. Rev. Stat. 1953, C. 432, Sec. 432.040. It charged the defendants with—

> "the crime of advocating, suggesting or teaching the duty, necessity, propriety, or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing, or knowingly circulating, selling, or distributing, or having in their possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting, or teaching, criminal syndicalism or sedition, or of organizing or helping to organize, or becoming a member of or voluntarily assembling with any society or assemblage of persons that teaches, advocates, or suggests the doctrine of criminal syndicalism or sedition, committed in manner and form as follows, to wit:
>
> "The said [defendants] * * * did knowingly and feloniously, by word of writing, advocate or suggest the duty, necessity, propriety, and expediency of physical violence, intimidation, terrorism or other un-

lawful acts or methods to accomplish a political end or to bring about political revolution, and did advocate or suggest by word, act, or writing, public disorder or resistance to, or the change or modification of the Government, Constitution, and Laws of the United States and the Commonwealth of Kentucky, by force, violence or other unlawful means, and did knowingly circulate, sell, or distribute, and did have in their possession for the purpose of publication or circulation, written or printed matter, advocating, suggesting, and teaching criminal syndicalism, or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence, or other unlawful means, and did become members of a society or assemblage, and did assemble with persons teaching, advocating or suggesting the doctrine of criminal syndicalism or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence or other unlawful means * * *"

Only Vernon Bown was indicted for the actual bombing. He was charged with having "exploded dynamite in or near the house."

Another indictment was returned on November 4, 1954, against Mr. and Mrs. Braden, Bown, Ford, and one Lewis Lubka, at the time of the bombing a union shop steward in a local General Electric plant. These defendants were charged with conspiring to destroy the Wade house "to accomplish a political end, or to bring about political revolution, to-wit, to incite racial disturbances and hatred between the Negro and white races * * *"

---

* It is probably indicative of the lack of occasion to use these enactments that the only previous indictments under the state sedition and criminal syndicalism statutes (a single one under each enactment) were brought over twenty years ago. Both cases were reversed because the offense which was sought to be punished, in each case obstructing an officer, did not constitute sedition or criminal syndicalism. *Gregory v. Commonwealth*, 226 Ky. 617, 11 S. W. 2d 432 (1928); *Loyless v. Commonwealth*, 241 Ky. 82, 43 S. W. 2d 348 (1931).

To date only Carl Braden has been tried, and he only under the sedition indictment. His trial began on November 29, 1954, and was concluded with a verdict of guilty on December 13, 1954.

The entire process was marked by substantial violations of constitutional rights. Prior to the opening of Braden's trial, Commonwealth officials conducted several illegal searches and seizures. The apartments shared respectively by Bown and Ford and the Misses Gilbert and Spiker were raided, the former twice, and large quantities of literature seized without warrants, so far as can be ascertained. A search and seizure was likewise carried out in Lubka's apartment, but although his wife was told that there was a search warrant, she was not permitted to read it. The Bradens' house was raided twice, on October 5 and 7, 1954, while they were both in custody. In their case the warrants were issued on affidavits sworn to by the Commonwealth Attorney, which in turn based themselves on information obtained from Braden's fifteen-year-old foster daughter. On both occasions, literature and other material were seized. The warrants did not specifically describe the items to be seized, nor did the affidavits upon which they were based disclose reasonable ground to suspect the commission of a crime. The fruits of the illegal searches and seizures in the Braden house were introduced into evidence at the trial, despite the fact that it was shown that the integrity of the seized books and documents had not been preserved between the dates of the searches and the time of trial, and that certain items not seized at the Braden home were mixed with the books and documents taken from there.

The proceedings at Braden's trial clearly revealed that national rather than local issues, and ideas and associations protected by the First Amendment, were involved. Significantly, all nine of the professional ex-Communist witnesses and informers called by the Commonwealth in its

testimony in chief were from outside the state and not acquainted with the defendant.* Their testimony was substantially to the same effect. They stated that the Communist Party advocated the violent overthrow of the government and planned to establish by force and violence a Negro nation in the south, that certain of the literature and material allegedly seized was Communist and would only be owned by a Communist Party member; and that the organizations with which the defendant was said to be affiliated were Communist fronts. The other prosecution witnesses were either police officers, involved in guarding the Wade residence or in the searches of the Braden house, or local residents, including Andrew Wade IV and his father, Andrew Wade, Jr., both of whom denied ever having been members of the Communist Party and who testified on their relationship with Braden and the circumstances surrounding the acquisition of the house. Although the indictment made no reference to the bombing, and there was no evidence in the trial to connect the defendant with this incident, a radio instructor was called by the prosecution to testify concerning the possibility of setting off a bomb by means of a radio battery, such as was found in the Wade house and said to belong to Bown. With few exceptions, the hundreds of books and papers introduced against the defendant had no connection with the state of Kentucky. Two of the items given the greatest prominence by the prosecution were the *Communist Manifesto* by Marx and Engels, published in Germany in 1848, and a pamphlet issued by the House Committee on Un-American Activities, entitled *100 Things You Should Know About Communism in the U. S. A.*, which contained a quotation attributed to William Z. Foster. There was no evidence that the defendant had

* The nine informer witnesses were Martha Edmiston of Waynesville, Ohio; John Edmiston of Columbus, Ohio; Arthur Paul Stranik of Dayton, Ohio; James W. Glatis of Jamaica Plain, Massachusetts; Matthew Cvetic of Lawrenceburg, Pennsylvania; and Manning Johnson; Maurice Malkin, Leonard Patterson and Benjamin Gitlow of New York.

"circulated", "distributed", or "published" either of these items or had any intention to do so. Other documents dealt with the Korean War and the Communist government in China, and were likewise published outside the state.

Taking the witness stand, the defendant made a point by point denial of the allegations in the indictment, including past or present membership in the Communist Party, and disputed ownership of certain materials seized in the raids which prosecution witnesses had said could only belong to a member of the Communist Party. He attributed his collection of Marxist literature to his lifelong interest in and study of labor history and the social sciences. The prosecution's cross-examination of the defendant again dealt largely with national and international issues and organizations; his membership in or contributions to the Progressive Party, the American Peace Crusade and groups on the Attorney General's list, and his views on such questions as trade with China, Universal Military Training, the Internal Security Act of 1950, and the Korean War. Several defense witnesses established that the Marxist books found in Braden's library were freely available to the public and that some were used in college courses. Other defense witnesses testified that Braden, as a labor reporter for the *Louisville Times*, had been instrumental in averting or settling three major strikes, that they had never heard him advocate sedition or the overthrow of the government by force and violence, and that in his work he had been known to edit stories so that they would conform with the facts in a way inconsistent with the Communist position.

The national characteristics of the prosecution's case were further demonstrated on rebuttal. The Commonwealth called as a surprise witness Mrs. Alberta Abearn, who described herself as a seamstress and a paid F.B.I. undercover agent in the Communist Party in Louisville since 1951. Through this rebuttal witness the prosecution for the first time produced direct evidence that the defendant had been a Communist Party member. Mrs. Abearn

testified that she was recruited into the Communist Party by Carl and Anne Braden and had attended numerous cell meetings with them both, bought literature recommended by them and paid dues to them. She acknowledged on cross-examination, however, that none of the books which she said Mr. and Mrs. Braden recommended to her referred to the overthrow of the Kentucky or United States governments, but said they spoke of "world revolution which would include the United States". The defense was prevented from examining Mrs. Ahearn's F.B.I. reports.

On surrebuttal, Braden denied all of Mrs. Ahearn's charges. He testified that Mrs. Ahearn had been a personal friend of his wife and had frequently visited his home, discussing on these visits their common interests in the American Peace Crusade, the Progressive Party and the Militant Church movement. At her request he had lent her books from his library, but had stopped doing so when she failed to return them.

The remaining prosecutions in Kentucky on sedition and related charges have been postponed until decisions are handed down by this Court in the present case and by the Court of Appeals of Kentucky in the *Braden* case. "We do not believe," the Commonwealth Attorney has been quoted as saying, "it is necessary or desirable to incur further large expenditures of money in the prosecution of these cases until the appellate courts have ruled upon the validity of the laws upon which these prosecutions are based." (*Louisville Courier-Journal*, April 7, 1955.) Criminal Court Judge L. R. Curtis has likewise declared that the future of the Kentucky sedition cases hinges completely on the outcome of the case at bar. "The action of the Supreme Court should determine the validity of the law relating to sedition and criminal syndicalism presently in force in this state." (*Louisville Courier-Journal*, April 7, 1955.)

B. Massachusetts

The Massachusetts criminal anarchy act (Mass. Ann. Laws, c. 264, sec. 11 (1954 Supp.)), like the Kentucky statutes discussed above, is a product of the anti-radical hysteria which gripped the nation following World War I. As amended in 1948, it authorizes a maximum punishment of $1000 fine and three years' imprisonment for anyone who

> "by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States * * *."

Until the indictments of *amici curiae* here and others, which will be discussed in detail below, there was apparently only one prosecution under this statute, that of one Bimba in 1926; whose case was dropped during his appeal from a fine of $100. Chafee, *The Inquiring Mind*, 108 ff. (1928).

This criminal anarchy act was supplemented in 1951 by even more sweeping legislation, outlawing the Communist Party and any "subversive organization". The preamble of the new enactment described it as "an emergency law necessary for the immediate preservation of the public safety". Acts and Resolves of 1951, c. 805; also appearing in Mass. Ann. Laws, c. 264, secs. 16 ff. (Supp., 1954).

Section 16 of the 1951 act defines as a "subversive organization" any association of three or more persons "for the common purpose of advocating, advising, counseling or inciting the overthrow by force or violence, or by other unlawful means, of the government of the commonwealth or of the United States." Section 16A makes the legislative

finding that the Communist Party is a "subversive organization", and Section 17 states, "A subversive organization is hereby declared to be unlawful." Section 18 provides for a judicial proceeding to adjudicate any other organization "subversive". Section 19 prohibits knowing membership in an organization found to be "subversive" on pain of punishment by a fine of not more than $1000 or by imprisonment for not more than three years, or both. Section 22 makes subject to maximum punishment of a fine of $1000 or a year's imprisonment, or both, "whoever being in charge of an auditorium, hall or other building shall knowingly permit it to be used by the Communist Party or by * * * a subversive organization * * *." Section 23 makes liable to a maximum punishment of $1000 or three years' imprisonment, or both, "whoever contributes money or any other property having a value in money to an organization which he knows to be a subversive organization * * *."

Two cases involving altogether ten persons have been brought under the old criminal anarchy statute. Neither has come to trial, and their disposition awaits a decision as to the constitutionality of the act by the Massachusetts Supreme Judicial Court, which in turn is awaiting the decision of this Court in the instant case.

On September 12, 1951, a Middlesex grand jury indicted Dr. Dirk J. Struik (*amicus curiae* here), Harry E. Winner and Mrs. Margaret Gilbert for violation of the criminal anarchy law. There are three separate indictments against Dr. Struik, an internationally known mathematician and professor at the Massachusetts Institute of Technology. The first charges him, in the words of the statute, with the substantive offense of advocating, advising, counseling and inciting the overthrow by force and violence of the government of the Commonwealth of Massachusetts. *Commonwealth v. Struik*, Middlesex Sup. Ct. Crim. No. 40725. The second indictment charges him with conspiring together with Harry E. Winner, Margaret Gilbert and Martha H.

Fletcher to advocate and incite the overthrow of the *government of the United States*. The third indictment is identical with the second, except that the Commonwealth of Massachusetts is substituted for the United States of America. *Commonwealth v. Struik, et al.*, Middlesex Sup. Ct., Crim. Nos. 40726 and 40727. Mr. Winner is a business executive from Malden, well known in Malden and Boston for his active participation in community affairs. Mrs. Gilbert was living in Chicago at the time of the indictments, and fought her extradition to Massachusetts on a charge of which she claimed complete innocence; she was extradited after considerable litigation, was brought to Massachusetts for arraignment and is now on bail.

The purported associations of Dr. Struik and Mr. Winner had been publicly advertised in federal forums as early as 1949 by the F.B.I. informer Herbert A. Philbrick.* While Philbrick's testimony dealt with alleged subversive activities in Massachusetts, the former undercover agent did not mention any threat whatever to the safety of that state as such. The dangers described by Philbrick were to American capitalism and the American system of government. Nevertheless the United States government did not see fit to take action against the individuals involved here.

In fact the Commonwealth itself can hardly claim that it felt itself in imminent peril from these three persons. Having obtained his test case indictments on September 12, 1951, District Attorney George E. Thompson announced that he would not even arrest these supposedly dangerous

* Philbrick named Dr. Struik in the trial of *Dennis v. United States*, 341 U. S. 494, on April 8, 1949. (6 R. 4280). On July 23, 1951, Philbrick appeared before the House Committee on Un-American Activities and charged Dr. Struik and Mr. Winner with membership in the Communist Party. 82nd Cong., 1st Sess., Committee on Un-American Activities, Hearings, *Exposé of Communist Activities in the State of Massachusetts (Based on the Testimony of Herbert A. Philbrick)*, pp. 1296-1297. Both these persons also testified in this hearing.

seditionists for "a week or so" (*Boston Daily Globe*, September 13, 1951); and it was left to Dr. Straik and Mr. Winner to appear voluntarily for arraignment.

Although motions to quash the indictments were denied in the spring of 1952, the Commonwealth did not proceed to trial.

While the *Straik* case was held in abeyance, another grand jury investigation into possible violations of the criminal anarchy act was commenced in Suffolk County in the election year 1954, to the accompaniment of sensational headlines and lurid news stories. Judging by these accounts, the proceedings were largely taken up with the testimony of such veteran federal informer-witnesses as Herbert A. Philbrick and Louis F. Budenz. See, for example, *Boston Post*, May 8, 11, and 13, 1954.

An indictment couched almost entirely in the words of the statute, charging seven persons with conspiracy to advocate and incite the overthrow of the governments of the Commonwealth of Massachusetts and the United States was handed up on May 20, 1954. *Commonwealth v. Hood, et al.*, Suffolk No. 2457 (1954). Again, there is not the slightest reason to suppose that those indicted were unknown to federal authorities. Several were well known functionaries of the Communist Party in Massachusetts over many years. Otis Archer Hood, *amicus curiae* here, has run four times for governor of the state on the Communist Party ticket as well as for various public offices. The other *amici curiae* involved in this case, Mrs. Anne Burlak Timpson; Mrs. Edith Abber and Franklin P. Collier, Jr., were similarly well known.

Also on May 20, 1954, a court order was issued for the seizure of books and periodicals at Mr. Hood's home. Other quantities of books were taken without authority of court order from the homes of Mrs. Abber and Herbert Zimmerman, one of the defendants. Like their owners, these books were at first put behind the bars of a jail cell (see Boston

newspaper photographs on May 21, 1954). But apparently the incarcerated volumes did not measure up to the Commonwealth's evidentiary requirements. On May 25, 1954, District Attorney Garrett H. Byrne returned the search warrant to the court with the notation:

> "* * * it is not necessary that any of the aforesaid papers, pamphlets, documents, other materials used to advocate overthrow of government by unlawful means should be longer kept for the purpose of being produced or used as evidence on any trial * * *, and he prays that the same may be burned or otherwise destroyed under the direction of said Court * * *."

This attempt at book burning was forestalled by the strenuous efforts of counsel for Mr. Hood and on November 15, 1954, Judge Edward O. Gourdin ordered the books released. However, it was not until the following January after 236 days in jail that the books, which included children's literature and the writings of Thomas Jefferson, Frederick Douglass, Franklin D. Roosevelt, George Washington and Abraham Lincoln, as well as Marxist works, were finally returned.

Although the 1954 statute illegalizing the Communist Party, the "emergency law necessary for the immediate preservation of the public safety" cited *supra*, states in its preamble that "the deferred operation of this act would tend to defeat its purpose, which is to provide without delay for the common defense and to promote our *national security* against enemies from without as well as from within in the face of a clear and present danger," it was not until April 8, 1954, that the first and so far sole indictment was obtained under it. The indictment named the same Otis Archer Hood who was a few weeks later charged with violation of the criminal anarchy act, see *supra*.

The one indictment under this statute was obtained only after the Commonwealth had been challenged by Mr. Hood

Although Boston newspapers indicated Mr. Hood's availability in 1951 (see, for example, *Boston Globe*, July 24, 1951) it was not until after Hood's much-publicized appearance on March 18, 1954, at a public hearing of the Massachusetts Special Commission on Communism that the Attorney General told the press that he would seek an indictment against him. *Boston Herald*, March 20, 1954. In reply, Hood filed a petition in the Suffolk Superior Court on April 2, affirming his Communist Party membership and requesting a declaratory judgment on the constitutionality of the 1951 law. Hood further asked for a restraining order enjoining the Attorney General from prosecuting him under the act. A hearing was set for April 5. The Attorney General immediately arranged to raid what had once been the Communist Party headquarters in Boston, but which had been closed for some time. *Boston Traveler*, April 2, 1954. The raiders seized some plaster plaques and busts and a rent bill and had themselves photographed with a copy of *The Great Conspiracy: the Secret War Against Soviet Russia*, by Michael Sayers and Albert E. Kahn, which was published by Little, Brown & Company in 1946 and subsequently sold in hundreds of thousands of copies. *Boston Daily Globe*, April 3, 1954. The following day, April 3, 1954, the Attorney General obtained a warrant for Mr. Hood's arrest based on a District Court complaint charging him with "becoming or remaining a member of a subversive organization." Hood was arrested at his home that day. *Boston Sunday Globe*, April 4, 1954. Two days later, on April 5, the Hood petition for a temporary restraining order was denied, and on April 8 the Suffolk County Grand Jury indicted Hood on the charge for which he was already under arrest, adding a second count, that of contributing money to the Communist Party. *Commonwealth v. Hood*, Suffolk Sup. Ct., Nos. 1923 and 1924.

Any survey of the anti-subversive program of the Commonwealth of Massachusetts would be incomplete without mention of the activities of its legislative committees in this field. These activities further illustrate (a) the apparent lack of any local threat to the safety of the state; (b) the national character of the matters investigated; and (c) the abuses of constitutional rights which appear to be the constant accompaniment of state action in this area.

In 1950 the Massachusetts Legislature entered the field already overcrowded by federal activity with a Committee to Curb Communism. Massachusetts House Order No. 2788, 1950, states:

> "The committee appointed hereunder shall conduct an investigation of the Communist Party and Communist-front organizations within the Commonwealth which are actively engaged in Communist indoctrination or in propaganda against the *military efforts of the United States in support of the United Nations*." (Emphasis added.)

This preoccupation with matters national and international continues through the committee's report published on March 30, 1951 (Mass. House Documents, No. 2323, 1951). After discussing "world Communism" and "Communism in the United States", the committee found:

> "The outstanding activity of the Communist-front organizations in Massachusetts during the period of this investigation is the 'peace' front movement. We found that almost every Communist inspired activity was, in some respect, flavored with the word 'peace'" (at p. 19).

As evidence of the threat of communism, the committee cites the Lawrence textile strike of 1912 (at pp. 12-13). In a supplementary statement to this report one of the committee members, Representative William E. Hays, specifically denied the need for state legislation in this field:

"Although I have subscribed to the report, I do not agree with the legislative recommendations appended to it. In my opinion the pressing need of the moment is not legislation but a well-informed public * * *. I do not feel there is an urgent need to enact hasty legislation. *There is adequate federal law to deal with any serious subversive activity.*" (Emphasis added.)

The successor to this committee was the "Special Commission on Communism, Subversive Activities and Related Matters Within the Commonwealth," created on June 2, 1953, and given an almost unlimited field of investigation including "the diffusion within the Commonwealth of subversive and un-American propaganda that is instigated from foreign countries." Mass. Acts and Resolves of 1953, Chapter 89. The Commission's life has been renewed from year to year, most recently on May 13, 1955. Mass. Acts and Resolves of 1955, Chapter 52.

Hundreds of witnesses have been interrogated in private sessions since 1953. No accurate figures can be given because even the records of public hearings have never been published. Witnesses and spectators alike have agreed that newspaper accounts have been hopelessly inadequate. Consequently, reliable documentation is lacking concerning the activities of this investigatory body. Just how much justification there can be for this kind of investigation in Massachusetts may be gathered from the fact that after laboring for two years the Commission produced a report listing a total of 85 persons "who have been members of the Communist Party" (Senate Documents, No. 760, 1955). Biographies of the accused consist of nothing but lists of alleged affiliations, reading habits, education, and such details designed to prejudice as "father and mother native of Russia." To each biography is appended a notation such as, "This commission had received creditable evidence of Communist and subversive activities" on the part

of that individual. The Court will recognize this as a revival of the medieval criminal sanction of infamy.*

Like its predecessor, the Commission is constantly recropping pastures already grazed by federal authorities. For example, when Attorney General Brownell proposed on December 20, 1954, to add the Massachusetts Committee for the Bill of Rights to his subversive list, the Commission immediately announced that it, too, would probe this group. *Boston Daily Globe*, December 31, 1954. Such hearings were held on January 7, 1955. Similarly, when on November 19, 1953, the late William Teto, a professional informer whose veracity was beclouded by a substantial criminal record, appeared as a witness before the Senate Permanent Subcommittee on Investigations, then headed by Senator Joseph R. McCarthy, the Commission promptly issued a subpoena for Teto to appear before it. *Boston Globe*, November 21, 1953.

Whatever benefit to national security the Massachusetts anti-subversive drive may have provided, it has been more than cancelled out by harmful duplication of the work of national agencies, imposition of repeated burdens of interrogation upon witnesses already examined by investigative

* Pursuant to chapter 123 of the Acts and Resolves of 1954, the Commission was directed to file a final report as follows:

"Such report shall include the name and all other identifying data available to the commission, of any individual, concerning whom the commission, during the course of the investigation, has received creditable evidence that such individual was or is a member of the Communist Party, a Communist or a subversive."

* Five prominent Massachusetts attorneys have challenged this statutory mandate in a pending action, *Kaplan, et al. v. Boucher, et al.* Supreme Judicial Court, No. 11,572. This matter is now scheduled for argument in November of this year. In addition, two persons named in the report of July, 1955, have brought suit, seeking to expunge the quasi-judicial finding that they are subversive persons, *Luscombe v. Boucher, et al.*, Suffolk Sup. Ct., No. 70,047 In Equity, and *Lorusso v. Boucher, et al.*, Suffolk Sup. Ct., No. 69,984, In Equity.

bodies of the national government, accompanied by unwarranted stigmatization of "uncooperative" witnesses as disloyal, and indictments hastily obtained but not tried. One may seriously question whether a concern for protecting the public order or plain political demagogy is the controlling motivation.

C. Florida

The Florida statutes contain a number of provisions prohibiting "subversive" advocacy and associations. Fla. Stat. 1953, Sec. 876.01-876.03 and Sec. 876.22-876.30. These not only proscribe membership in, association with, or the promotion of the interests of any "communistic" organization or a "subsidiary" thereof, but also membership in or support of a "subversive organization" as defined in the statute.* These enactments are comprehensively

* The key provisions are as follows:

"876.01 *Criminal anarchy, communism, etc., prohibited.*—Criminal anarchy, criminal communism, criminal nazi-ism, or criminal fascism are doctrines that existing forms of constitutional government should be overthrown by force or violence or by any other unlawful means, or by assassination of officials of the government of the United States or of the several states. The advocacy of such doctrines either by word of mouth or writing or the promotion of such doctrines independently or in collaboration with, or under the guidance of officials of a foreign state or any international revolutionary party or group is a felony.

"876.02 *Criminal anarchy, communism, etc., defined and made a felony; penalty.*—Any person who—

"(1) By word of mouth or writing advocates, advises, or teaches the duty, necessity or propriety of overthrowing or overturning existing forms of constitutional government by force or violence; of disobeying or sabotaging or hindering the carrying out of the laws, orders, or decrees of duly constituted civil, naval or military authorities; or, by the assassination of officials of the government of the United States or of the State of Florida, or by any unlawful means or under the guidance of or in collaboration with officials, agents or representatives of a foreign state or an international revolutionary party or group; or

intended to cope with what is termed in their preamble the "World Communist movement". This complex of anti subversive laws formed the legal basis for the grand jury investigation into alleged Communist and subversive activi-

---

ties or printed matter in any form, containing or advocating, advising or teaching the doctrine that constitutional government should be overthrown by force, violence, or any unlawful means; or

"(3) Openly, willfully and deliberately urges, advocates, or justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any official of the government of the United States or of the State of Florida because of his official character, or any other crime, with intent to teach, spread, or advocate the propriety of the doctrines of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism; or

"(4) Organizes or helps to organize or becomes a member of any society, group or assembly of persons formed to teach or advocate such doctrines; or

"(5) Becomes a member of, associated with or promotes the interest of any criminal anarchistic, communistic, nazi-istic or fascistic organization, or helps to organize or becomes a member of or affiliated with any subsidiary organization or associated group of persons who advocates, teaches, or advises the principles of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism;

"Shall be guilty of a felony and upon conviction thereof be subject to imprisonment for not more than ten years or a fine of not more than ten thousand dollars, or both.

"876.03 *Unlaceful assembly for purposes of anarchy, communism, etc.*—Whenever two or more persons assemble for the purpose of promoting, advocating or teaching the doctrine of criminal anarchy, criminal communism, criminal nazi-ism or criminal fascism, as defined in Sect. 876.01 of this law, such an assembly or organization is unlawful, and every person voluntarily participating therein by his presence, aid or instigation shall be guilty of a felony, and upon conviction thereof shall be subject to imprisonment for not more than ten years or a fine of not more than ten thousand dollars, or both.

"876.22 Definitions—As used in Sections 876.23-876.31:

* * * * * *

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow

ties in Dade County, Florida, launched in June, 1954, by State's Attorney George A. Brautigam.

On November 19, 1954, the Supreme Court of Florida reversed the contempt convictions of fourteen persons, *amici curiae* here, arising out of this inquiry. *State ex rel.*

---

destruction of, the constitutional form of the government of the United States, the constitution or government of the State of Florida, or of any political subdivision of either of them, by revolution, force, violence or other unlawful means.

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy, or to assist in the overthrow, destruction of the constitutional form of the government of the United States, or of the State of Florida, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country, nation or group of nations other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy, or to assist in the overthrow, destruction of the constitutional form of the government of the United States, or of the State of Florida, or any political subdivision of either of them, by revolution, force, violence or other unlawful means; or who is a member of a subversive organization or a foreign subversive organization.

"876.23. *Subversive activities unlawful; penalty.*

"(1) It shall be a felony for any person knowingly and willfully to:

"(a) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy, or to assist the overthrow, destruction of, the constitutional form of the government of the United States, or of the State of Florida, or any political subdivision of either of them, by revolution, force, violence, or other unlawful means; or

Eldridge, et al. v. Kelly, 76 So. 2d 798. Each petitioner in that case had been convicted of contempt for refusing to answer questions before the grand jury on the ground that his answer might incriminate him. Each had invoked the protection of the Fifth Amendment to the Constitution of the United States and Section 12, Declaration of Rights, Constitution of Florida. As summarized by the Florida Supreme Court, the questions propounded to petitioners before the grand jury "all fell under one of the following categories":

---

such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the State of Florida, or of any political subdivision of either of them; or

"(c) Conspire with one or more persons to commit any such act; or

"(d) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization, or a foreign subversive organization; or

"(e) Destroy any books, records or files or secretes any funds in this State of a subversive organization or a foreign subversive organization, knowing said organization to be such.

"(2) Any person who violates any of the provisions of this section shall be fined not more than twenty thousand dollars, or imprisoned in the penitentiary for not less than one year nor more than twenty years, or both.

"876.24 *Membership in subversive organization; penalty.*—It shall be a felony for any person, after the effective date of this law to become, or after July 1, 1953, to remain a member of a subversive organization or a foreign subversive organization, knowing said organization to be a subversive organization or foreign subversive organization. Any person convicted of violating this section shall be fined not more than five thousand dollars, or imprisoned in the penitentiary for not less than one year nor more than five years, or both."

[illegible] December 1, 1954, forty-one witnesses in the grand jury anti-subversive probe, had been cited for contempt for refusing to testify under the plea of self incrimination. *Miami Herald*, December 2, 1954. Of the thirty-one who were sentenced for contempt, fourteen won acquittal from the Supreme Court of Florida in the case cited supra. In the face of this decision, the [illegible] organization will be stipulated.

"(1) Questions concerning the witness' contacts with or association with the Communist Party or organizations affiliated with the Communist Party.

"(2) Questions concerning the witness' acquaintance with or association with various named persons allegedly members of the Communist Party or organizations affiliated with the Communist Party.

"(3) Questions concerning meetings attended by the witness at which various named persons allegedly members of the Communist Party or of organizations affiliated with the Communist Party were present."

In the *Feldman* decision the court held that the privilege against self-incrimination was available to the petitioners since, because of the similarity between the Florida criminal communism statute, read in the light of subsequent legislative findings, and the federal Smith Act, the cases of *Blau* v. *United States*, 340 U. S. 159, and *Brunner* v. *United States*, 190 F. 2d 167, reversed 343 U. S. 918, are controlling. Concerning the similarity of the federal and state statutes the court said:

"Chapter 20216, Laws of Florida, now Section 876.01-876.04 F. S. A., under which the present investigation was instituted, was passed in 1941. In legal effect the latter Florida Act is a rescript of the Smith Act, both having been designed for the same purpose. The Florida Act having been patterned on the Smith Act, we have elected to accept the interpretation of the Smith Act by the Federal Courts. * * *

"* * * The act in question, Section 876.02, F. S. A., as does the Smith Act, provides that if the evidence shows that one is 'a member of, associated with, or affiliated with' any organization which 'advocates, advises, or teaches the duty, necessity, or propriety of overthrowing or overturning existing forms of constitutional government by force or violence' that is sufficient to establish guilt."

The Florida court's statement that the statute made it a crime to be a member of the Communist Party or of a

"Communist-front" organization, as well as its specific reference to the state statute as "outlawing the Communist Party", were received as a green light by the prosecuting authorities. State's Attorney George A. Brautigam immediately announced to the press that the court's decision was "just what we are looking for. Now we can go forward and seek indictments on mere membership in the Communist conspiracy". The State's Attorney indicated that he would seek indictments for conspiracy under the state law. The *Miami Daily News* of January 10, 1955, quoted him as follows:

> "'Up to a point,' [Brautigam] said, 'we are following somewhat the same order of procedure in the investigation as we did before the state supreme court decision. We question persons first in my office. If they invoke the Constitutional protection against self-incrimination, they then are subpoenaed to appear before the grand jury.'
>
> "Those who continue to refuse to answer inquiries before the grand jury, he indicated, will be subject to indictment as members of the Communist Party conspiracy against the state of Florida. * * * Anyone who has been involved in any way in a continuing conspiracy such as the Communist Party, the prosecutor explained, cannot quit merely by 'ceasing active participation.' 'In the eyes of the law,' Brautigam said, 'once a Communist always a Communist—unless they can prove otherwise.'"

In the course of the grand jury proceedings established legal procedures were repeatedly and flagrantly violated. For example: on September 22, 1954, Circuit Judge George E. Holt signed orders requiring seventeen witnesses to show cause why they should not be cited for contempt for their refusal to answer questions before the grand jury. But none of these witnesses had as yet appeared before the grand jury; they were not subpoenaed to testify, as a matter of fact, until September 23rd. Thus the orders signed by Judge Holt recited events which had not yet

taken place. Moreover, mimeographed opinions, identical in text, stating Judge Holt's reasons for convicting the seventeen witnesses were filed in advance of the hearings on the contempt citations. In explaining this incredible procedure (reminiscent of the *lettres de cachet* of pre-Revolutionary France) State's Attorney Brantigam stated that this was done for his own convenience. *Miami Herald*, October 12, 1954.

Witnesses were questioned intensively about membership in such organizations as the Southern Conference for Human Welfare, the F. D. R. Club, the American Veterans Committee, and the Progressive Party. One witness was asked about postcards mailed to Florida's senators protesting the Walter-McCarran Immigration Act. It is noteworthy that the anti-subversive campaign reached a peak in the months immediately following the desegregation decision by this Court. According to the *Miami Herald* of August 29, 1954, a University of Miami research group reported to State Attorney General Richard Ervin that "competent officials have been reluctant to take initial steps [toward integration] for fear of being branded Communists." It is also difficult to resist the conclusion that Florida's anti-subversive program is tinged with anti-Semitism. Twenty-nine of the thirty-one persons convicted of contempt are Jews, including five leaders of Jewish community groups. The Miami Jewish Cultural Center was a repeated object of grand jury inquiries. Other witnesses subpoenaed by the grand jury, all of them Jewish, included the cantor of a synagogue whose spiritual leaders had been active in resisting the local witch hunt.

There are ample grounds for doubting the genuineness of the claims of a subversive threat in Florida expressed by state officials. The House Committee on Un-American Activities held a three-day hearing in Miami from November 29 to December 1, 1954. At the conclusion of this investigation, the *Miami Daily News* of December 2, 1954, reported that the committee had "uncovered no evidence

of Communist activity in the South in the last five years." Chairman Harold H. Velde was quoted as saying that he was convinced that "the Communist situation is not as bad in Florida or anywhere else in the Southeastern states as in other parts of the country where the committee has held hearings."

A recognition by state authorities that there is no subversive threat requiring urgent action is indicated by the position of the state's principal legal officer. Attorney General Richard Ervin announced earlier this year that he had not requested funds in his budget for anti-Communist investigations and would make no recommendations to the legislature on the subject. *Miami Herald*, February 23, 1955. On May 16, 1955, the Florida House Appropriations Committee overwhelmingly rejected a bill proposed by the American Legion and Ellis Rubin, a special assistant attorney general assigned to ferreting out Communists in Florida, which was designed to give Rubin subpoena powers in an investigation of Communism, and an appropriation of $110,000. The vote was 16 to [redacted] against the bill after an impassioned appeal by Rubin on behalf of the measure, in which he sought to answer charges that he wanted to conduct a "witch hunt". Committee members said they would rather leave the investigation of Communist activities to the federal government. Attorney General Ervin specifically left it up to the legislature to determine whether a "real Communist threat" exists in Florida. The appropriations committee apparently did not think so. *Miami Herald*, May 17, 1955. This rejection took place after a four month investigation of Communist activities conducted by Rubin, culminating in a ninety one page report. A conference of the governor and state attorneys which considered the report in April of this year took no action to implement it. On May 17, 1955, Rubin resigned from his state post, announcing that he would campaign against the eleven representatives who had defeated his bill. *Miami Herald*, May 18, 1955.

Thus there are ample indications that the anti-subversive campaign in the State of Florida is not actuated by the existence of any real threat, but rather by local politics and social tensions.

D. New Hampshire

The present anti-subversive program of the State of New Hampshire originated in 1949 when a former national commander of the American Legion spurred public clamor and legislative concern by referring to a "Communist cell" at the state university. Gellhorn, *The States and Subversion*, 371 (1952). However, after a year of investigation and deliberation by a legislative commission, it was concluded that, on the basis of information gathered from law enforcement agencies, there was "very meager" evidence of the existence of subversive activity in the state. Nor was this particularly surprising in view of the F. B. I. statement that there were only forty-three Communists in the entire state. *Ibid.*, 371. The legislative commission, in its final report, said that exposure of Communist activities was a job for a national, rather than a local police organization.

However, the agitation for anti-subversive action persisted, and on June 17, 1953, the New Hampshire General Court authorized the state's attorney general to make a "full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons . . . are presently located within this state." Attorney General Louis C. Wyman was "authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable." Joint Resolution, Laws of 1953, c. 307.

The New Hampshire Subversive Activities Act of 1951, N. H. Rev. Laws, c. 457 A, is practically identical in all relevant sections with Florida Statutes, Sections 876.22 ff., quoted *supra*.

The constitutionality of both the Subversive Activities Act of 1951 and the Joint Resolution of 1953 were challenged in the New Hampshire Supreme Court, on the grounds, *inter alia*, that the federal government had preempted this field of legislation. *Nelson v. Wyman*, 99 N. H. 33, 105 A. 2d 756 (1954). The court held that both were constitutional, expressing its disagreement with the conclusion of the Pennsylvania Supreme Court in the instant case.

Acting under authority of the joint resolution as it related to the Subversive Activities Act, Attorney General Wyman adopted rules of procedure which completely disregarded established legal processes and constitutional rights. He required that the investigation proceed in executive sessions unless public hearings were sought by a witness. Another rule provided that testimony be released to the public if a witness invoked the privilege against self-incrimination. (The New Hampshire Supreme Court later ruled that such a discriminatory publication of testimony was not within the Attorney General's authority as granted by the legislature. *Nelson v. Wyman*, supra, at 967.) As the investigation proceeded, the distinction between criminal and non-criminal conduct or advocacy became completely blurred. As the Attorney General acknowledged, the rules of procedure were designed to allow his inquiry to range over a limitless area in order to determine "whether the activities of a given individual had involved honest dissent or actual subversion whether criminal or not." *Report of the Attorney General to the New Hampshire General Court*, VIII (January 5, 1955), hereinafter called the *Wyman Report*. Although the statute on which the investigation is founded specifies the crucial elements of scienter and intent ("knowingly and wilfully"), the New Hampshire Attorney General felt compelled to inquire into the activities of an individual designed to be subversive "whether or not intentionally so or knowingly so on his part." *Wyman Report*, x. With scienter and

ment of facts conveniently put aside, it is hardly surprising that the Attorney General moved away from an investigation of actual criminal acts in violation of the sedition statute into the area of individual beliefs and associations. The Attorney General candidly admits that this is the objective of the investigation. "This process must, without a doubt continue as long as the spark of 'belief' in communism remains in any citizens of our state." *Wannall Report*, 58.[2]

The all-embracing character of the New Hampshire Attorney General's investigation is demonstrated in his report. As far as the strength of the Communist Party in New Hampshire is concerned, the report concedes that the pickings were indeed slim:

> "* * * The Communists were able to muster between two hundred and three hundred votes in the various elections in which their candidates were on the ballot in New Hampshire. The figures on Communist Party membership in New Hampshire as released by Hon. J. Edgar Hoover, Director of the Federal Bureau of Investigation, prior to the passage of the Subversive Activities Act of 1951, placed the Party membership at approximately fifty in New Hampshire. This investigation has established identities of about forty-five who were Communist Party members at approximately that time, although in many cases the exact dates of departure from New Hampshire or of separation from the Communist Party is in doubt. Of those, eight have cooperated, eighteen are now beyond the jurisdiction of New Hampshire, fifteen have refused to answer as to possible present membership, and the status of a handful is in doubt due to expiration of the investigation or as to dates of their departure from New Hampshire.

> "Many of the above number have died and others have left the state, and a considerable number have left the Community Party. * * *
>
> * * * Subsequent to the adoption of the 1953 resolution, there has been virtually no discernible open Communist Party activity in this state." *Wyman Report*, 44-45, 60.

Greatest attention was focussed on Mrs. Elba Chase Nelson, reportedly the leading official of the Communist Party in New Hampshire, and her son, Homer Bates Chase, former state chairman of the Communist Party in Georgia. As to the latter, the Attorney General concluded that "no demonstrable evidence has been found to date indicating a violation of the Subversive Activities Act of 1951." *Wyman Report*, 202. A similar conclusion was reached with respect to Mrs. Nelson. *Wyman Report*, 238. In the light of such conclusions as to the activities of what are alleged to be leading Communists, it is not surprising that the Wyman Report as a whole contains no finding that any person cited therein has violated any provision of the Act.

To keep his investigation going, the Attorney General was forced to range far and wide. As the report states:

> * * * Testimony was taken in many other states. Information was received from individuals and cooperating state and national agencies, coast to coast and border to border. Representatives of this office went outside the state several times in the course of the enquiry, seeking data pertinent to the investigation. Former Communists who held offices of both national and international scope assisted in amassing a considerable volume of information." *Wyman Report*, 45.

Further underscoring the national rather than local scope of the investigation is the New Hampshire Attorney General's dependence on the lists and citations compiled by federal agencies. For example, considerable space is devoted to Professor Zechariah Chafee's Digest of the Un-

versity of New Hampshire because he was reported to have endorsed or sponsored or signed a statement for various national organizations cited as subversive by the United States Attorney General or by the House Committee on Un-American Activities, and had been associated with the Progressive Party. There was no allegation that Professor Daggett was a Communist. *Wyman Report*, 66-77. Similarly, Professor Vilhjalmur Stefansson, residing at the time of the investigation in Vermont, was alleged to have been affiliated with various cited organizations. The report also discusses in extenso Professor Stefansson's association with Professor Owen Lattimore. *Wyman Report*, 108-118.

Dr. Willard Uphaus, another witness (and *amicus curiae* herein), was likewise reported to have been affiliated with cited organizations. *Wyman Report*, 162 ff. He was called to testify primarily in connection with World Fellowship, Inc., of which he is executive director. As a witness before the New Hampshire Attorney General, Dr. Uphaus described this movement as "religiously motivated" and seeking "to bring together for fellowship and discussion the representatives of all Faiths to the end that there may be peace, brotherhood and plenty for all men, women and children." He answered fully and freely all questions about himself and his own beliefs and affiliations. He denied, under oath, that he was or ever had been a Communist. He stated that he was opposed to the use of violence by reason of his religious convictions. He stated freely that he had been associated with two or three organizations on the United States Attorney General's "subversive" list, but declared such connections to be religiously motivated. As head of the Attorney General to produce the names and addresses of guests at World Fellowship camps, seminars, recreational and educational centers, and correspondence with speakers, Mr. Uphaus refused on the grounds that the request violated the constitutionally guaranteed freedom of religion, speech and assembly. His refusal was found in contempt

of court and fined $500. *Wyman Report*, 161. This contempt conviction was unanimously reversed by the New Hampshire Supreme Court on September 27, 1955, on the ground that Uphaus, a resident of Connecticut, had been served with a summons in New Haven. *Concord Daily Monitor*, September 28, 1955.

The terrible subversive plot presented by World Fellowship can be best savored by an examination of the *Wyman Report*, a document that can only be compared in tone and accuracy to Elizabeth Dilling's notorious *Red Network*. Some 62 participants in World Fellowship in the summers of 1953 and 1954 are described in greater or lesser detail. *Wyman Report*, 137-156. Most of them were placed under the convenient derogatory heading of "the usual contingent of 'dupes' and unsuspecting persons that surround almost every venture that is instigated or propelled by the 'perennials' and articulate apologists for Communists and Soviet chicanery." *Wyman Report*, 154. Included in this category were

Samir Ahmed, Third Secretary of the Embassy of Egypt

Dean and Mrs. Harvey F. Baty, of the American University, Beirut

Miss Eleanor French, personnel secretary of the Canadian Y. W. C. A.

Colonel Basil Herman, senior Israeli delegate to the Israel-Egypt Mixed Armistice Commission of the United Nations

The Rev. and Mrs. Ram Krishna S. Modak, president, All-India Federation of National Churches

A. L. A. Pesik, Indonesian director of publicity in the United States.

Attorney General Wyman stated that he expressed no conclusion "whether Mr. Uphaus is an unwitting dupe or

a conscious pro-Communist participant . . . it appears that his repeated association with membership in and sponsorship of Communist infiltrated groups and Communist Party members over many, many years raises a substantial question as to the real purposes and objectives of World Fellowship, Inc., of which he is Executive Director." *Wyman Report*, 175. On the basis of this "question," without any basis for a belief that Dr. Uphaus ever belonged to any organization that falls within the statute's proscription of intent to "overthrow the government by force and violence" and without proof of scienter, the Attorney General of New Hampshire brought contempt proceedings in court which have resulted in most damaging publicity to Dr. Uphaus and World Fellowship, Inc.

Called forth by New Hampshire's sedition statute, the Wyman investigation has uncovered no criminal activity in violation of that enactment, after an expenditure of two and one-half man years and $31,500. *Wyman Report*, 10. The state legislature this year voted to continue the probe for another two years and appropriated a further $42,500 for its work.[7] According to the New Hampshire Attorney General's breakdown, *supra*, there are possibly twenty Communists remaining in the state. One may well doubt the legitimacy of an investigation which contemplates an expenditure of nearly $4,000 per person in checking the possible threat to the State of New Hampshire from these twenty individuals. On the other hand, the Subversive Activities Act and the subsequent investigation have resulted in defamation of character, invasion of privacy and harassment of numerous innocent persons.

[7] An addendum report upon the federal area of action is to be issued in the utilization of state immunity statutes. A sweeping immunity power was recently granted the Attorney General of New Hampshire in the closing days of the last session of the General Court. The use of such a statute may well result in the deprivation of a witness' federal privilege. See, for example, *Ullmann v. United States*, 350 U.S. 422, 100 L. Ed. 511, 76 Sup. Ct. 497.

The following conclusions compellingly emerge from the fact recital which we have presented:

1. The proceedings we have described are not directed to the preservation of any legitimate state interest. There is not the remotest indication that in any of the four states we have discussed there has been any threat by word or deed to the sovereignty or the security of the state involved. Moreover, if there is any legitimate interest involved to which legal sanctions might conceivably attach, it is a federal interest and not a state interest.

2. The investigations and the indictments which resulted from the investigations all seem to be motivated by partisan interests, by personal ambition, and by demagogic considerations. They all are aptly characterized by the observation of the Pennsylvania Supreme Court in this case:

> "Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is important that punitive sanctions for sedition *against the United States* be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary. If that be done, sedition will be detected and punished, no less, wherever it may be found, and the right of the individual to speak freely and without fear, even in criticism of the government, will at the same time be protected." (Emphasis in original.)

3. All of the proceedings under discussion have been marked by repeated invasions of the procedural guarantees of due process of law. There have been violations of the

right to a hearing; the right to be free of unreasonable searches and seizures; the right to face one's accusers; the right not to be punished for a crime without the accusation.

4. In all of the four proceedings under discussion, there has been a parallel disregard for the rights of free expression protected by the Bill of Rights.

ARGUMENT

Introduction

A span of almost fifteen years has elapsed from the enactment of the Smith Act in 1940 until the passage of the Communist Control Act in 1954. During this period a wholly new body of law and legal principles has been promulgated in response to the cold war tensions between the West and the Communist powers. The numerous statutes which comprise this body of law are unified by an effort to protect the nation against remote dangers. They are not directed against presently dangerous speech as such. They seek to provide a prophylactic therapy against some future undermining or subversion of the country and are based upon a theory of prevention. It must be recognized that this body of laws constitutes an ever-growing threat to the basic liberties of the country. It has become the instrument for imposing conformity over wide areas of political dissent and has given rise to deep-seated fears on the part of many concerned with the survival of democracy in the country.

The basic assumption of this effort is that certain state [illegible] the Union have invited the Court to sanction [illegible]